JUN 18 1997
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(3)

No. 96-1617

In the Supreme Court of the United States

OCTOBER TERM, 1996

PUEBLO OF SANTA ANA, ET AL., PETITIONERS

v.

JOHN J. KELLY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Indian Gaming Regulatory Act of 1988 (IGRA) provides that Class III gaming is lawful if, inter alia, it is conducted in conformance with a Tribal-State compact that is "in effect." 25 U.S.C. 2710(d)(1)(C). IGRA further provides that a Tribal-State compact shall "take effect" when notice of approval of the compact by the Secretary of the Interior is published in the Federal Register. 25 U.S.C. 2710(d)(3)(B). In this case, the Secretary approved compacts entered into by the Governor of New Mexico and the petitioner Indian Tribes, but the New Mexico Supreme Court subsequently held that the Governor did not have authority under state law to enter into the compacts. The question presented is:

Whether the Tribal-State compacts remain "in effect" as a matter of federal law under IGRA, unless and until the Secretary withdraws his approval of the compacts, notwithstanding the decision of the New Mexico Supreme Court that the Governor did not have authority as a matter of state law to enter into the compacts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 104 F.3d 1546. The opinion of the district court (Pet. App. 35a-67a) is reported at 932 F. Supp. 1284.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. The petition for a writ of certiorari was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, eight federally-recognized Indian Tribes and a gaming enterprise chartered by a ninth Tribe, brought this action against the United States and several federal officials seeking a declaratory judgment that Tribal-State gaming compacts they had entered into with the State of New Mexico under the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2701-2721, are valid and in effect.[1] This controversy arose initially as a result of a decision of the New Mexico Supreme Court holding that the Governor who had signed the compacts on behalf of the State lacked authority under state law to do so. The United States filed a counterclaim for a declaratory judgment that petitioners' gaming activities were illegal for a reason independent of the validity of the Tribal-State compacts—namely, because petitioners' gaming activities were not in any event permitted under New Mexico law for any purpose by any person, as required by IGRA. See 25 U.S.C. 2710(d)(1)(B). The United States also joined New Mexico as a party defendant, and took the position (contrary to the position of New Mexico) that, if the district court reached the issue, the compacts remain "in effect" under IGRA (see 25 U.S.C. 2710(d)(1)(C)) because the Secretary of the Interior has not withdrawn his approval of them.

The district court entered judgment against petitioners, holding that the compacts are invalid because

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[1] The plaintiff Tribes are: Pueblo of Santa Ana, Pueblo of San Juan, Pueblo of Tesuque, Pueblo of Acoma, Pueblo of Sandia, Pueblo of Isleta, Pueblo of Pojoaque, and Pueblo of Taos. The Pueblo of San Felipe sued through the San Felipe Gaming Enterprise Board.

the Governor lacked authority under state law to enter into them. Pet. App. 34a-67a. The court of appeals affirmed on that ground. *Id.* at 1a-33a. Neither court reached the further question of whether the Tribes' gaming activities were permitted under state law.

1. Congress enacted IGRA "in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1119 (1996). Congress acted in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that state law is not applicable to gaming on an Indian reservation unless Congress so provides.[2] After *Cabazon*, "existing Federal law [did] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3).

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[2] *Cabazon* involved California, one of the six States to which Congress has expressly granted jurisdiction over specified areas of Indian country in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. California was granted broad criminal jurisdiction over offenses committed by or against Indians in Indian country within the State under Section 2 of Public Law 280 (67 Stat. 588-589), while Section 4 (67 Stat. 589) granted a more limited civil jurisdiction. See generally *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

In *Cabazon*, the Court held that Public Law 280 did not permit application of California's criminal laws to the Tribes' gaming because the State's laws, while regulating gaming, did not prohibit the types of games that the Tribes in that case operated. 480 U.S. at 207-214. The Court also held that, absent federal legislation, the State's laws regulating gaming were preempted under the special principles applied to state laws affecting Indians, which require a balancing of the respective federal, tribal, and state interests. 480 U.S. at 214-222 (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983)).

In enacting IGRA, Congress sought to establish a system for regulating gaming activities on Indian lands that would balance the competing interests of tribal and state governments. On the one hand, IGRA aims "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). On the other hand, IGRA contemplates a regulatory and supervisory role for the States and the federal government to prevent the infiltration of "organized crime and other corrupting influences." 25 U.S.C. 2702(2).

IGRA identified three classes of Indian gaming. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue in this case, includes all gaming not otherwise defined as Class I or Class II gaming. 25 U.S.C. 2703(8).[3] It includes house-banked card games such as baccarat and blackjack, casino games such as roulette and craps, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering and lotteries. 25 U.S.C. 2703(7)(B); 25 C.F.R. 502.4. Class III gaming is "the most heavily regulated of the three classes." *Seminole Tribe*, 116 S. Ct. at 1119-1120.

IGRA provides that Class III gaming activities are lawful on Indian lands only if those activities are (1)

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[3] Class I gaming consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consist of bingo, bingo-related games, and certain non-banking card games (*i.e.*, games such as poker that are played against other players, as distinguished from games such as blackjack that are played against the house). 25 U.S.C. 2703(7)(A). See *Seminole Tribe*, 116 S. Ct. at 1119 & n.1.

"authorized by [a tribal] ordinance" that is "approved by the Chairman" of the National Indian Gaming Commission, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State * * * that is in effect." 25 U.S.C. 2710(d)(1). The mechanism for entering into Tribal-State compacts is set forth at 25 U.S.C. 2710(d)(3)-(7). See *Seminole Tribe*, 116 S. Ct. at 1120. A compact does not "take effect," however, until it is approved by the Secretary of the Interior and notice of that approval has been published in the Federal Register. See 25 U.S.C. 2710(d)(3)(B). The Secretary may disapprove a compact only if it violates a provision of IGRA, any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8)(B).[4]

As the court of appeals explained (Pet. App. 16a), a Tribe's "[f]ailure to comply with any one of the three conditions [in 25 U.S.C. 2710(d)(1)] means the class III gaming is subject to applicable [federal] criminal statutes," described below. Thus, if there is no Tribal-State compact "in effect" under IGRA, a Tribe may not engage in Class III gaming. 25 U.S.C. 2710(d)(1)(C). And even if there is such a compact, a Tribe may not conduct Class III gaming activities in

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[4] If the Secretary does not approve or disapprove a compact within 45 days of when it is presented to him, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

a State that does not permit "such gaming for any purpose by any person." 25 U.S.C. 2710(d)(1)(B).[5]

If a particular form of gaming is illegal in a State, then federal criminal laws apply to ban such activity on Indian lands. Those federal laws include the Johnson Act, 15 U.S.C. 1171-1178, which prohibits gaming devices in Indian country[6]; a criminal provision enacted as part of IGRA, 18 U.S.C. 1166, which assimilates and applies to Indian country all laws of the State "pertaining to the licensing, regulation, or prohibition of gambling"; and the Organized Crime Control Act, 18 U.S.C. 1955, which prohibits gaming that is unlawful under state law.

2. a. The essential facts of this case are undisputed. See Pet. App. 6a-14a, 42a-45a. Briefly, in 1995 Governor Johnson of New Mexico and 13 Indian Tribes, including petitioners, signed compacts that provided for the Tribes to conduct Class III gaming. The compacts purported to authorize petitioners to engage in all forms of casino-style gaming, including slot machines, video gaming devices and various table games. Pursuant to 25 U.S.C. 2710(d)(8), the Secretary approved the compacts. The compacts thereupon "[took] effect" for purposes of IGRA. 25 U.S.C. 2710(d)(3)(B).

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[5] We discuss the latter requirement (that the gaming be located in a State that "permits such gaming for any purpose by any person") in the brief for the United States as amicus curiae that we filed on June 9, 1997, in response to the Court's invitation in *Sycuan Band of Mission Indians* v. *Wilson*, petition for cert. pending, No. 96-1059.

[6] In order for a gaming device to be legally possessed or operated in Indian country, the bar of 18 U.S.C. 1175 must be lifted through a Tribal-State compact. See 25 U.S.C. 2710(d)(6).

Subsequently, however, the New Mexico Supreme Court ruled that Governor Johnson had exceeded his authority in entering into the compacts; accordingly, it held them to be "without legal effect" as a matter of state law. *State ex rel. Clark* v. *Johnson*, 904 P.2d 11, 27 (N.M. 1995) (reproduced at Pet. App. 91a-126a). Of particular concern to the *Clark* court was the scope of gaming permitted by the compacts. The court discussed the question whether casino-style gaming was legal under state law and, without ruling specifically on what forms of gaming were permitted in the State, concluded that the compacts authorized more forms of gaming than were permitted by state law. *Clark*, 904 P.2d at 21.

Later in 1995, the New Mexico Supreme Court issued another opinion that addressed the legality of gaming in the State. See *Citation Bingo, Ltd.* v. *Otten*, 910 P.2d 281 (N.M. 1995). In *Citation Bingo*, a case that concerned whether electronic hand-held bingo devices were permitted by state law, the New Mexico Supreme Court clearly indicated that casino-style gaming, and in particular those forms of gaming conducted by petitioners, was unlawful in New Mexico.

b. Following the *Citation Bingo* decision, the United States Attorney for the District of New Mexico directed petitioners to close their casinos or face forfeiture proceedings. Petitioners then filed the instant suit seeking a declaratory judgment that the compacts were valid and that the Tribes were engaged in forms of gaming permitted by state law.[7] The

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[7] In addition to their claims under IGRA, the Tribes asserted that the United States' actions violated the trust responsibility and deprived them of due process, and that the

United States counterclaimed, contending that petitioners' gaming operations were illegal—whether or not the compacts were valid or in effect—and urged the district court to enter judgment against petitioners on that basis. The United States accordingly suggested that the district court need not reach the issue of the validity of the compacts. The United States further argued, however, that if the court were to reach that issue, the compacts remained "in effect" for purposes of IGRA unless and until the Secretary of the Interior withdrew his approval of them. The State of New Mexico argued that petitioners' gaming operations were illegal on both grounds—*i.e.*, that the compacts were invalid in light of *State ex rel. Clark* v. *Johnson*, and that such Class III gaming was not permitted in New Mexico in any event under both *Clark* and *Citation Bingo*. See Pet. App. 14a-15a, 44a-45a.

The district court held that the compacts were invalid on the ground that they had not been validly "entered into" by the State. See 25 U.S.C. 2710(d)(1)(C). The district court did not accept the United States' argument that the compacts were "in effect"—for purposes of satisfying that condition under IGRA for Class III gaming to be lawful in the State—unless and until the Secretary withdraws his approval. Pet. App. 52a. The court did not reach the issue of whether casino-type gaming is permitted in New Mexico. *Id.* at 60a. The court stayed its judgment pending appeal. *Id.* at 34a, 81a.

United States should be estopped from seeking to enforce federal gaming laws against them. Those claims were rejected by the district court (Pet. App. 61a-66a), and are no longer presented by petitioners.

c. The court of appeals affirmed, likewise holding that the Tribal-State compacts were invalid because the Governor lacked authority under state law to enter into them. Pet. App. 1a-33a. Rejecting the United States' position that the compacts remain "in effect" for purposes of IGRA, the court of appeals held that a compact that was not validly "entered into" by a State cannot "go into effect, via Secretarial approval, under IGRA." *Id.* at 22a, 32a. Like the district court, the court of appeals found no need to reach the United States' alternative argument that the tribal gaming at issue is illegal under federal law in any event because New Mexico does not permit such Class III gaming activities for any purpose by any person. *Id.* at 33a. The court of appeals, too, stayed its judgment pending "final resolution of this matter" in the court of appeals or in this Court. *Ibid.*

3. As petitioners note (Pet. 20 n.13), since the court of appeals' decision, the New Mexico Legislature has passed, and the Governor has signed, a law that offers a compact to the Tribes and that would, under specified circumstances, permit the Tribes to engage in casino-style gaming.[8] H.B. 399, 43d Leg., 1st Sess. (1997). No compacts under that new state law have yet been submitted to the Secretary for his approval under IGRA.

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[8] Section 70 of H.B. 399 provides as follows:

> DELAYED EFFECTIVE DATE.—The provisions of the Gaming Control Act shall be effective on the date that a tribal gaming compact agreed upon and executed by an Indian nation, tribe or pueblo and the state is approved pursuant to the provisions of the Indian Gaming Regulatory Act, 25 USCA Section 2701, et seq.

ARGUMENT

We agree with petitioners that the court of appeals erred in holding that the Tribal-State compacts that petitioners and the Governor of New Mexico signed are not "in effect" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(1)(C). That question, however, does not warrant review by this Court. There is no circuit conflict on the question. Moreover, the result reached by the court of appeals is correct, because, as the United States argued below, petitioners' Class III gaming activities were unlawful on the independent ground that they were not permitted in New Mexico for any purpose by any person. And since the time of the court of appeals' decision, New Mexico has enacted a new law that expressly provides for Tribal-State compacts.

1. Both courts below correctly recognized that whether a Tribal-State gaming compact satisfies the requirements of IGRA—thereby satisfying one of the three conditions under 25 U.S.C. 2710(d)(1) for Class III gaming to be legal under IGRA—is a federal question. Pet. App. 28a-29a, 52a. A compact provides a framework for legal gaming by a Tribe when it is "in effect." A compact "take[s] effect" under IGRA "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register."[9] 25 U.S.C. 2710(d)(3)(B). In deciding whether to approve the compact, the Secre-

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[9] As pointed out above (see note 4, *supra*), if the Secretary does not approve or disapprove a compact within 45 days of its submission to him, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

tary is directed to consider the provisions of IGRA, other provisions of federal law, and the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8)(B).

IGRA is silent concerning the circumstances, if any, under which a compact that has been entered into by a State and Tribe, and "take[s] effect" under IGRA upon approval by the Secretary, may thereafter become ineffective as a matter of federal law. As a general rule, however, the power of a federal official to make a decision carries with it the power to reconsider that decision. *Trujillo* v. *General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson* v. *Federal Communications Comm'n*, 182 F.2d 397, 399 (D.C. Cir. 1950)) ("The power to reconsider is inherent in the power to decide * * * in the absence of any specific limitation."). In light of that general rule and IGRA's silence on the point, we believe that the Secretary of the Interior has the authority to withdraw his approval of a compact. In doing so, the Secretary presumably would consider the same statutory factors that he is to consider in deciding whether to approve or disapprove a compact in the first place.[10]

As a result of the New Mexico Supreme Court's decision in *Clark* v. *Johnson* that the Governor did not have authority under state law to enter into the compacts on behalf of the State, it is clear that the compacts are not in effect for state law purposes. We may assume as well that because of the Governor's

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[10] Where a Tribe has a strong reliance interest resulting from its investment in gaming operations based on the Secretary's approval of a compact, the Secretary could take that circumstance into account in considering whether to withdraw his approval.

lack of authority, the State is not bound to adhere to any affirmative obligations that it assumed under the compacts as written. It is a distinct question, however, whether the compacts remain "in effect" for the more limited purpose of satisfying one of the three conditions in 25 U.S.C. 2710(d)(1) for Class III gaming by a Tribe to be legal as a matter of *federal* law. By virtue of Congress's plenary power over Indian affairs, a State has no inherent sovereign power to regulate gaming on Indian lands within its borders. Congress nevertheless chose to afford the State an opportunity, through the Tribal-State compacting process, to play a role in determining the circumstances under which such gaming will be permitted.[11] But because the compacting process is entirely a creature of federal law in an area in which the States would have had no authority in the absence of IGRA, there will be no substantial infringement on state sovereignty if a compact entered into by the Governor of a State and approved by the Secretary of the Interior remains "in effect" for purposes of IGRA despite a subsequent determination that the Governor lacked authority to enter into the compact as a matter of state law. As we have just explained, the only result would be to satisfy one of the conditions Congress has specified to render the gaming lawful under federal law, not to commit any sovereign authority of the State.

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[11] If the negotiating process fails to result in a compact, the Secretary of the Interior is authorized to promulgate procedures "under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. 2710(d)(7)(B)(vii).

Of course, a determination that the Governor lacked authority under state law to enter into a compact in the first place would be a relevant factor for the Secretary to consider in deciding whether to withdraw his approval of a compact.[12] In this case, however, the State of New Mexico has not requested the Secretary to reconsider his approval of the compacts at issue here on that ground. Unless and until the Secretary does so, the compacts remain "in effect" for purposes of IGRA. This understanding of the Secretary's authority advances the purposes of IGRA by preventing one party to a compact from exercising unilateral power over the compact's status, and by promoting certainty and consistency.

2. Although we believe that the court of appeals erred in holding that the compacts signed by petitioners and the Governor of New Mexico are invalid as a matter of federal law, that issue does not warrant further review. There is no conflict among the circuits for this Court to resolve. The Tenth Circuit is the first court of appeals to rule on the issue petitioners seek to present. Although the United States shares petitioners' concern that the holding below may encourage "collateral attacks" on Tribal-State gaming compacts under IGRA (Pet. 7-8), if such

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[12] The Secretary presumably would give that factor great weight if, for example, the State was rendered unable to carry out an important role assigned to it under the compact in regulating gaming and in protecting Indians and other members of the public from crime and corrupting influences. See 25 U.S.C. 2702(2). On the other hand, the Secretary would not be compelled to withdraw his approval if, for example, the state-law deficiency in the compacting process concerned a ministerial requirement and the effect on gaming regulation and other federal interests was not substantial.

lawsuits do occur, the issue may be decided differently by other courts of appeals. There accordingly is no reason for the Court to depart from its usual practice of awaiting further developments in the lower courts, rather than granting review in the first case raising a particular legal issue. Moreover, as we argued below, the Tribes' Class III gaming operations were unlawful for the independent reason that such gaming is not in any event permitted in New Mexico "for any purpose by any person." See 25 U.S.C. 2710(d)(1)(B).

Finally, the State Legislature has enacted a new law that authorizes Tribal-State compacts and that would permit Class III gaming by Tribes under certain conditions. N.M. H.B. 399, 43d Leg., 1st Sess. (1997). That new law may provide a means for petitioners to engage legally in casino-type gaming. Alternatively, the new law may spawn more disputes and litigation. In either event, the recent developments in New Mexico may significantly affect the practical importance of the particular compacts at issue here, the decisions of the New Mexico Supreme Court in *Clark* and *Citation Bingo*, and the question presented by petitioners to this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1997